

Exhibit R
Public Version

January 14, 2011

VIA HAND DELIVERY

The Honorable Debra C. Freeman
United States Magistrate Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: *Arista Records LLC, et al. v. Lime Wire LLC, et al.*, No. 06 CV 5936 (KMW) (DCF)

Dear Judge Freeman:

Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively “Defendants”) respectfully submit this short reply in further support of their December 10, 2010 application for an Order, pursuant to Federal Rule of Civil Procedure 45(c)(2)(B)(i), overruling the discovery objections asserted by non-party Google, Inc. (“Google”) and directing Google to produce documents in response to a subpoena served on Google on September 23, 2010 (the “Subpoena”). (Capitalized terms used herein have the same meaning as in Defendants’ letter brief to Your Honor, dated December 10, 2010.)

After months of wrangling (but not until Defendants were forced to make their application), Google has grudgingly agreed to produce all of its licensing agreements with Plaintiffs as well as the revenue information Defendants sought, abandoning its objections to those requests. (*See* 1/6/11 Letter from M. Ingber to Hon. D. Freeman (“Google Opp’n”).) Google has also abandoned its jurisdictional objections to the subpoena (which were patently frivolous), leaving no doubt about this Court’s authority to enforce the Subpoena. (*See id.*) Accordingly, the only remaining issue is whether Google must produce any of the communications it had (whether internally at Google or with Plaintiffs) concerning its licensing agreements with Plaintiffs or LimeWire. According to Google, it has no obligation to search for or produce so much as a single email on those topics because (i) its communications with Plaintiffs are “completely duplicative of productions made by Plaintiffs,” (ii) its internal communications are “irrelevant” to the issues to be tried, and (iii) requiring it to search for and produce either category of communications would be unduly burdensome. If it has to produce any of those communications, Google continues, Defendants must foot the bill, and reimburse Google for its

attorney's fees and the costs it will incur in engaging outside vendors to help it locate and produce responsive documents.

As we demonstrate below, there is no foundation to Google's presumption that its emails with Plaintiffs will necessarily be duplicative of those Plaintiffs have already produced. Indeed, our experience with other non-parties demonstrates quite the opposite. Nor is there any merit to Google's contention that its internal emails are "irrelevant." On the contrary, such relevance objections have already been rejected by this Court and, based on the documents Plaintiffs have produced, we know there must be internal Google emails that bear directly upon the issues to be tried in this case. As to burden, the notion that one of the most sophisticated search technology companies in the world cannot fashion a means of locating and producing responsive documents in an efficient manner without the help of outside vendors is simply not credible. Even if that were true, as a company with more than \$20 billion in annual revenues, Google is in no position to complain of "undue burden." Google should therefore be ordered to produce the documents without any further delay.

Google's Emails With Plaintiffs Should Be Produced.

Neither the Federal Rules of Civil Procedure nor the relevant case law precludes a party from obtaining discovery from a non-party where the information sought is likely to be available from the requesting party's adversary. *See In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 301 (S.D.N.Y. 2003) (holding a non-party must produce documents in response to a subpoena even though they were seemingly duplicative of discovery requests served on the other party). Indeed, "there is no general rule that plaintiffs cannot seek nonparty discovery of documents likely to be in defendants' possession." *Viacom Int'l, Inc. v. YouTube, Inc.*, No. C 08-80129, 2008 WL 3876142, at *3 (N.D. Cal. Aug. 18, 2008). In accord with this principle, this Court has already permitted Defendants to take document discovery from non-party licensees even though those same documents were called for by Defendants' document requests to Plaintiffs. (*See* 11/23/10 Order (Dkt. 367) (the "VEVO Order").) Notably, this Court issued that Order, which required VEVO to produce certain communications with Plaintiffs, at a time when Plaintiffs were under a preexisting obligation to produce those same communications with VEVO. (*See id.* at 2.) VEVO has already produced numerous such communications in accordance with that Order. Other non-parties (to whom we provided copies of the VEVO Order) have agreed to produce the same categories of documents and are in the process of doing so.

Notwithstanding this settled rule, the VEVO Order, and the willingness of other subpoenaed non-parties to fulfill their obligations under Rule 45, Google would have this Court conclude that it is somehow special. According to Google, it should not be required to produce its communications with Plaintiffs because Plaintiffs have already produced their communications with Google and, thus, any Google emails would necessarily be "entirely duplicative" of documents Plaintiffs "have in fact produced." (Google Opp'n at 1, 3.) Before it is compelled to produce any of these documents, Google contends, Defendants must prove that Google possesses documents that Plaintiffs have not produced. (Google Opp'n at 4.) Google is flat out wrong, for at least the following six reasons.

First, Google seeks to impose on Defendants a test that no litigant could possibly satisfy: to prove that unknown emails are missing from Plaintiffs' production without the opportunity to discover whether the emails exist through some other source. By definition, Defendants cannot know what unknown documents have not been produced by Plaintiffs. Indeed, the very purpose of seeking the email correspondence from Google is to ensure that Defendants receive a complete set of such communications. That is entirely proper. In addition, even if it were possible to identify the gaps in Plaintiffs' productions, those productions are not complete, and there is no time left before the close of fact discovery to wait for Plaintiffs to complete them, identify the "gaps," and then go back to Google with a renewed request for a search. Given that the Subpoena was served in September 2010, and that Defendants diligently sought to work out an acceptable compromise with Google and were stonewalled at every turn, any further delay would be both unwarranted and unduly prejudicial.

Second, the reality of present day records retention and retrieval makes it very unlikely that the productions from Plaintiffs and Google will necessarily be coextensive, as Google cavalierly asserts. For one thing, Plaintiffs and Google may not have the same policies regarding document and email retention, leading to potential disparities in the data set that would be searched for responsive documents. For example, it could very well be that one or more Plaintiffs implemented an auto-delete feature on their email system, such that emails older than a specified period are automatically deleted, or a feature requiring the deletion of emails once a given custodian's mailbox reaches a certain size. It could also very well be that Google has no deletion feature based on either aging or mailbox size, but rather automatically archives all such emails, such as through a Zantaz or similar system. If the retention practices of Plaintiffs and Google differ, as is commonly the case for different business entities, the universe of documents to be searched would not necessarily be the same, and the results of that search would perforce differ. *See, e.g., Viacom Int'l*, 2008 WL 3876142, at *3 ("Defendant YouTube's poor initial record keeping raises questions about the completeness of its files, and neither YouTube nor respondents have provided the Court with reason to believe that YouTube retained all communications and documents shared with respondents"). By the same token, even if Plaintiffs and Google did have the same retention systems, there is no basis to assume the productions would be duplicative unless Plaintiffs and Google went about collecting and reviewing potentially responsive communications in exactly the same fashion. For that to happen, Plaintiffs and Google would presumably have to use the same set of custodians, apply the same search terms, and use the same date filter, all without the prospect of human error. Significantly, although Google bears the burden of proof with respect to its "duplicative" objection, it has not even attempted to show (i) that its document retention policies are similar to Plaintiffs' policies; or (ii) that it would follow the same review and production protocol as Plaintiffs. That omission is telling in light of the fact that Google has been in communication with Plaintiffs about their production and therefore had the means to make this proof, if it were true. As a result, it is entirely reasonable to believe that Google may well possess emails and other communications that Plaintiffs either no longer retain and, therefore, cannot produce, or that Plaintiffs have retained but have failed to produce because they were not identified through their search efforts.

Third, the nature of the documents to be produced do not constitute a well-defined set such that their complete production can easily be verified. The point is perhaps best illustrated by contrast. If, for example, the request were for copies of all corporate minutes, a corporate director might legitimately

protest that such documents could be sought from the corporation itself and that the completeness of the corporation's production could be confirmed easily. In this instance, by contrast, the set of documents at issue are email communications "relating to licensing." Where, as here, a party "request[s] a set of documents that is not well-defined," looking at an opposing party's production alone is not sufficient to determine whether all documents have been produced, making it "appropriate" to require the production of such documents from a non-party, "even though the documents are likely to be in the possession of [a party]." *Viacom Int'l*, 2008 WL 3876142, at *3 ("Viacom and other plaintiffs request a set of documents that is not well-defined; there is no way to determine if all communications between YouTube and respondents have been produced simply by looking at YouTube's production"); *see also Software Rights Archive, LLC v. Google, Inc.*, Misc. No. 09-017-JJF, 2009 WL 1438249, at *3 (D. Del. May 21, 2009) (compelling non-party to produce documents relating to, *inter alia*, its relationship with Software Rights Archive, plaintiff in the underlying action, because those documents "do not constitute a well-defined set that Software Rights Archive can verifiably provide in full").

Fourth, the differences between the requests in the Subpoena (as upheld by Your Honor in the VEVO Order) and the terms of the Order requiring Plaintiffs to supplement their production are such that there can never be complete overlap between Google's production and Plaintiffs' production. For instance:

- Plaintiffs' production is limited to certain communications from 2007 on. The Subpoena, by contrast, calls for communications from January 1, 2005 through the present. As such, it is entirely possible that Google will have responsive documents during that time gap that Plaintiffs never looked for and will never produce.
- Plaintiffs' production is limited to communications located in the mailboxes of certain custodians they unilaterally selected, without Defendants' input and over our objections. Inexplicably, those custodians do not include individuals who have been noticed for deposition and/or are identified as knowledgeable witnesses on Plaintiffs' initial disclosures. Nevertheless, Plaintiffs have refused to look for responsive emails from these custodians' mailboxes.¹ In the VEVO Order, however, Your Honor ordered VEVO to produce responsive communications it had with some of those very custodians *e.g.*, Zach Horowitz and Charles Ciongoli (CEO and CFO, respectively, of Plaintiff Universal Music Group). (*Compare* 11/23/10 Order (Dkt. 367) at 2 *with* Ex. A (Plaintiffs' custodian list).) Unless Plaintiffs are ordered to search the mailboxes of those other custodians, it is very likely that the only source of such documents will be the non-parties, like Google.

Fifth, the productions made as of January 10, 2011, already demonstrate that communications produced by non-parties are not duplicative of the documents produced by Plaintiffs, contrary to Google's assertion. For example:

¹ That dispute is among the topics addressed in Defendants' motion to compel, which has now been fully briefed. *See* 1/5/11 Letter from M. Eaton to Hon. D. Freeman; 1/10/11 Letter from M. LeMoine to Hon. D. Freeman; 1/13/11 Letter from T. Mundiya to Hon. D. Freeman.

- Plaintiffs' production includes slightly more than 1,000 communications with VEVO. By contrast, VEVO's production contains in excess of 2,500 communications with one or more Plaintiffs. This is so even though Plaintiffs searched for communications involving more of its employees than VEVO did and despite the fact that Plaintiffs claimed to have used the same search terms VEVO used.
- Sworn testimony submitted by MySpace, Inc. ("MySpace") suggests that Plaintiffs' production appears to be incomplete. In a Declaration filed in the Central District of California in opposition to a motion to compel the production of communications responsive to Defendants' subpoena, counsel for MySpace stated that the search parameters that this Court ordered VEVO to use to locate potentially responsive communications would "likely to generate thousands, if not tens or hundreds of thousands, of 'hits.'" (Ex. B ¶ 18.) By contrast, in Plaintiffs' production fewer than 1,500 documents even reference MySpace, of which only approximately 600 represent communications between MySpace and any Plaintiff, and a number of those communications are duplicates. While not all of those "tens or hundreds of thousands of hits" in MySpace's files (*id.*) may be responsive to the Subpoena, it is certainly reasonable to believe that they will generate substantially more responsive documents than the under-600 communications with MySpace that Plaintiffs have produced.

Sixth, Google's argument that it should not be required to produce categories of documents which Plaintiffs are not presently under an obligation to produce falls under its own weight. This Court has already ordered a similarly situated non-party served with a subpoena that was identical in all material respects to do just that, and did so *after* the "abeyance" order was made. (See 11/23/10 Order at 2.) There is no reason why Google should be treated any differently. What is more, the fact that Plaintiffs' obligation to produce was held in abeyance is obviously not the same thing as relieving Plaintiffs of the duty to produce entirely — which is precisely the relief Google seeks here. To the contrary, the Court issued its "abeyance" order in response to Plaintiffs' complaint that the burden of producing its internal communications was undue, in light of the other categories of documents they were required to produce. It is for that reason that the Court permitted Defendants to revisit the issue once Plaintiffs had completed their production, and demonstrate that the additional documents ought to be produced, which we have now done. Obviously, such a two-tiered approach has no application to a non-party that has not produced any communications whatsoever and only proposed such an approach after months of stony silence. And, even if that approach were theoretically appropriate, there is simply no time left in the schedule to allow Google to produce its documents in that fashion. Discovery will be over by the time we ever get to "phase two."




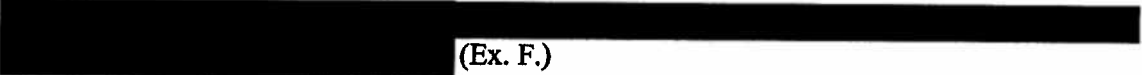
Given all of this, there is every "reason to believe" that Plaintiffs' production of communications with Google is not complete. Google should therefore be required to produce its communications with Plaintiffs forthwith.

Google's Internal Emails Should Be Produced.

It is beyond dispute that documents bearing on "the conduct and attitude of the parties" are relevant, and thus the proper subject of a subpoena, because that is one of the six factors that the Court must

take into account in determining the amount of statutory damages for copyright infringement. (See 10/15/10 Order at 5-6.) As this Court has held, this factor encompasses both “Plaintiffs’ attitudes regarding the value of [their] copyrights” and how “Plaintiffs conducted themselves in dealing with others in the Internet marketplace.” (*Id.* at 6.) That holding was reiterated in the VEVO Order, which required VEVO to produce both communications with Plaintiffs and internal VEVO communications concerning LimeWire. (See 11/23/10 Order at 2.) Internal Google documents discussing Google licensing agreements with Plaintiffs and LimeWire will illuminate either Plaintiffs’ views as to the true value of their works or how Plaintiffs acted towards Google and other online digital music providers, which are matters this Court has already determined are “relevant to Plaintiffs’ damages claims.” (See 10/15/10 Order at 1.) *Accord Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989) (lower award of statutory damages is appropriate where the copyright holder has acted in bad faith); *Entral Grp. Int’l, LLC v. YHLC Vision Corp.*, No. 05-CV-1912, 2007 WL 4373257, at *3 (E.D.N.Y. Dec. 10, 2007) (holding that low statutory damage award was “justified by the attitude and conduct of *plaintiff*” which made unreasonable licensing fee demands) (emphasis added).

Based solely on the documents Plaintiffs have produced thus far — which production Defendants believe is substantially incomplete and is presently the subject of a fully-briefed motion to compel — *it is crystal clear that Google is in possession of exactly the sorts of communications the Court had in mind in issuing the foregoing orders.* For example²:

-  (Ex. C.)
-  (Ex. D.)
-  (Ex. E.)
-  (Ex. F.)

² The following bullet points have been redacted in the version of this letter that is being sent to Matthew D. Ingber, Esq., counsel for Google, Inc., because they include information from documents that have been designated “Restricted Confidential—Outside Atty’s Eyes Only” by Plaintiffs, pursuant to the Protective Order in this case, an amended version of which was entered on January 6, 2011. We have requested from Plaintiffs’ counsel the authority to share these documents with Google. If Plaintiffs agree to our request, we will provide Google with an unredacted copy of this letter along with copies of the Exhibits referenced in the bullet points.

[REDACTED]
(Ex. G.)

Such documents reflect the lack of harm suffered by Plaintiffs as a result of the existence of free music on the internet and concretely refute Plaintiffs' contention that, but for LimeWire, music consumers would have purchased content from sites like iTunes. They also are clearly probative of Plaintiffs' conduct and attitude because they demonstrate Plaintiffs' hypocrisy in prosecuting LimeWire for alleged piracy while tolerating it from their business partners.³ Given the nature of these communications, it is inconceivable that Google has no internal documents reflecting the allegations of piracy and being compared to p2p sites, such as LimeWire. Indeed, internal documents discussing the level of music piracy permitted by Google and tolerated by Plaintiffs directly undermines the assertion that Plaintiffs were being harmed by unauthorized downloading.

Invoking *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003), Google next argues that its internal communications concerning Plaintiffs' conduct are irrelevant because they are "effectively[] opinion testimony from a non-party." (Google Opp'n at 6.) But *Mattel* is inapposite. As an initial matter, the subpoena in *Mattel* was quashed primarily because the district court found that the plaintiff engaged in a pattern of issuing overly broad subpoenas to the employers of its adversary's experts, in the hopes that the employers would pressure the experts to withdraw from the case and the employers would not have to respond to the subpoenas. *Mattel*, 353 F.3d at 813-14. There are no similar circumstances here. More importantly, the evidence sought by the subpoena in *Mattel* included documents reflecting a non-party museum's view about the market for an artist's work, which is clearly an area of expert testimony. *Id.* at 814. Here, by contrast, Defendants seek communications made in the ordinary course of business concerning, among other things, the negotiations of certain licensing agreements. Such communications are not expert or opinion testimony. They are evidence of facts, namely, the negotiations between Google and the Plaintiffs, especially with respect to the core issues of music piracy and the revenues being generated for Plaintiffs. See *In re Countrywide Fin. Corp. Sec. Litig.*, No. H8-85, 2008 U.S. Dist. LEXIS 67749, at *5 (S.D.N.Y. Apr. 2, 2008) (compelling compliance with subpoena because "[u]nlike *Mattel*, the plaintiffs ... seek[] specific factual information" that "was created contemporaneously by a participant in a transaction").

Google also argues that "much" of its internal correspondence is "likely" to be privileged, since Google's in-house attorneys were allegedly involved in the negotiations of its licensing agreements. This is nothing more than rank speculation, since Google has not even begun to search for responsive documents and thus has no basis to say what portion of them are privileged. Moreover, simply because an attorney was involved does not necessarily render the communications privileged, as Your Honor has correctly noted. (1/6/11 Hr'g Tr. at 17 ("Of course, attorneys who are acting in a business negotiation type capacity are not going to be able to claim privilege for a lot of what they do because if it's, you know, business advice that's being rendered as opposed to legal advice that's being rendered,

³ Evidence adduced in other litigations shows that Google was aware of its piracy issues well before Plaintiffs began negotiating with them. (See Ex. H.)

it's not going to pass muster as a privileged communication.”) Merely because some undefined portion of responsive documents may “likely” be privileged is no reason to relieve a subpoena recipient from having to search for and produce those documents that are not. *See Software Rights Archive, LLC v. Google, Inc.*, Misc. No. 09-017-JJF, 2009 WL 1438249, at *3 (D. Del. May 21, 2009) (finding that in a case in which “documents are of unquestionable relevance . . . Movants are entitled to have discovery of these documents to the extent they are not privileged. To the extent they are privileged, Respondents must produce a privilege log.”).

In short, Google clearly has relevant documents, notwithstanding its protestations to the contrary. It should be required to produce them.

Google Has Failed To Demonstrate That The Subpoena Is Unduly Burdensome.

Google has failed to demonstrate, as it must, that either the Subpoena or the proposal that Defendants' counsel offered to narrow the Subpoena's scope is unduly burdensome. *See In re Ramaekers*, 33 F. Supp. 2d 312, 314 (S.D.N.Y. 1999) (“The burden of persuasion is borne by the party opposing the subpoena.”). Although Google asserts in conclusory fashion that the costs associated with searching for and producing communications “are likely to be substantial,” Google makes no effort to substantiate that assertion. (Google Opp'n at 8.)

Defendants have offered to negotiate search terms and custodians with Google with respect to the request for communications relating to the licensing agreements. For example, though Google claims that searching for emails would require it to search an “extremely large” number of hard drives from “teams of employees” involved in the negotiations of its agreements with Plaintiffs, Defendants offered to limit the number of custodians to those employees whose involvement was most active and critical. And indeed, Google promised to provide Defendants with a list of such “key custodians,” but to date has not done so. Defendants also provided Google with a copy of this Court's VEVO Order as a proposed example of the parameters of a search for such communications. Google did not accept any of Defendants' proposals, however, and to this day has not made any alternative proposal for searching for such communications. It is apparent that Google's strategy is to try to avoid having to produce *any* email communications in this litigation, despite the Defendants' offers to negotiate the terms of a reasonable search.

In any event, Google has not even attempted to satisfy its obligation of demonstrating why searching for and producing these communications using agreed-upon custodians and search terms would impose an undue burden, *e.g.*, by demonstrating that even by employing these limitations, there would be too many “hits” or by otherwise quantifying what it would cost Google to comply. Instead, Google simply pronounces that its costs are likely to be “extremely high” and “substantial.” (Google Opp'n at 4, 8.) That is insufficient to excuse Google's obligation to comply with the Subpoena. *See Abu-Nassar v. Elders Futures Inc.*, No. 88 Civ. 7906, 1991 WL 45062, at *17 (S.D.N.Y. Mar. 28, 1991) (“general statements by counsel, unsupported by affidavits or other competent evidence, are inadequate to demonstrate the burden of complying with proposed discovery”); 9 James Wm. Moore, *et al.*, Moore's Federal Practice ¶ 45.51[4] (3d ed. 2009) (“A party objecting to a subpoena on the ground of undue

burden generally must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.”).

Moreover, the notion that a company with more than \$20 billion in annual revenues should not be required to respond to a subpoena unless the serving party covers every cent of the cost of compliance – including attorney’s fees – is offensive. Cost-shifting is only appropriate where the non-party seeking costs establishes that the burden is undue and provides reasonable estimates of the cost of compliance. Google has not come close to meeting that standard. To the contrary, its submission is suspiciously bereft of any detail regarding the number of custodians, the costs of collecting their mailboxes, the size of the data universe to be searched, the number of “hits” generated through the use of search terms and the like. During the parties meet-and-confer, Google was either unprepared or unwilling to share that information. Google’s application for costs should therefore be denied.

* * *

For all of the foregoing reasons and for those stated in Defendants’ letter brief to Your Honor, dated December 10, 2010, Defendants respectfully request that this Court issue an Order pursuant to Federal Rule of Civil Procedure 45(c)(2)(B)(i), that compels Google to produce the Documents, as required by the Subpoena, and grant Defendants such further relief as the Court deems just and proper.

We remain available at Your Honor’s convenience for a hearing on this application.

Respectfully submitted,

M. Eaton

Mary Eaton

Attachments

cc: Glenn D. Pomerantz, Esq. (via email)
Matthew D. Ingber, Esq. (via email with redactions and with Exhibits A, B and H only)

EXHIBIT A

**Arista et al v Limewire et al
Custodian List
December 3, 2010**

WMG-01	Bryan, Stephan	WMG	
WMG-02	Hrivnak, Tamara	WMG	
WMG-03	Kadokia, Payal	WMG	
WMG-04	Lockhart, Virginia	WMG	
WMG-05	Mcardy, Tucker	WMG	
WMG-06	Nash, Michael	WMG	
WMG-07	Peters, Elliott	WMG	
WMG-08	Rehrig, Paul	WMG	
WMG-09	Singer, Howie	WMG	
WMG-10	White, George	WMG	
WMG-11	Wilcox, Ron	WMG	
EMI-01	Abbattista, Michael	EMI	
EMI-02	Dimecelli, John	EMI	
EMI-03	Lauren, Amy	EMI	
EMI-04	Piibe, Mark	EMI	
EMI-05	Shah, Pat	EMI	
EMI-06	Spears, Dareelle	EMI	
UMG-01	Besnoy, Craig	UMG	
UMG-02	Campbell, Bill	UMG	
UMG-03	Doshi, Sachin	UMG	
UMG-04	Lee, Julie	UMG	
UMG-05	Mulein, Mark	UMG	
UMG-06	Nguyen, Kathleen	UMG	
UMG-07	Nussbaum, Wendy	UMG	
UMG-08	Sealey, Jaunique	UMG	
UMG-09	Stern, Eric	UMG	
UMG-10	Stone, Bryan	UMG	
UMG-11	Weinberg, David	UMG	
SONY-01	Blinder, Seth B.	SONY	
SONY-02	Bonavia, Christopher P.	SONY	
SONY-03	Christi, Coleen	SONY	
SONY-04	Hanser, Jennifer A.	SONY	
SONY-05	Howard, Whitney W.	SONY	
SONY-06	Kanusher, Lawrence A.	SONY	
SONY-07	Margulies, Natalie	SONY	
SONY-08	Papaleo, Christopher D.	SONY	
SONY-09	Paull, Michael D.	SONY	
SONY-10	Roberson, Michael	SONY	
SONY-11	Ross, Andrew	SONY	
SONY-12	Sherman, Robert	SONY	
SONY-13	Smith Jr., Stanley O. (Neil)	SONY	
SONY-14	Valero, Maria E.	SONY	
SONY-15	Walker, Jeff	SONY	

EXHIBIT B

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Attorneys for Non-Party Respondent MySpace, Inc.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Arista Records LLC; Atlantic Recording Corporation; BMG Music; Capitol Records, Inc.; Elektra Entertainment Group Inc.; Interscope Records; Laface Records LLC; Motown Record Company, L.P.; Priority Records LLC; Sony BMG Music Entertainment; UMG Recordings, Inc.; Virgin Records America, Inc.; and Warner Bros. Records Inc.,

Plaintiff,

v.

Lime Wire LLC; Lime Group LLC; Mark Gorton; and M.J.G. Lime Wire Family Limited Partnership,

Defendants.

CASE NO.: 10-9438 GW (PJW)
Honorable Patrick J. Walsh

DECLARATION OF JONATHAN GOTTLIEB IN SUPPORT OF NON-PARTY MYSPACE, INC.'S CONTENTIONS IN JOINT STIPULATION OPPOSING ENFORCEMENT OF SUBPOENA

(United States District Court For the Southern District Of New York, Civil Action No.: 06 CV 5936 (KMW), Honorable Kimba M. Wood, U.S.D.J.)

1 I, Jonathan Gottlieb, declare as follows:

2 1. I am a member of the bar of the State of California and of this
3 Court. I serve as Senior Vice President, Litigation, of Fox Group Legal. My
4 duties in that role include handling litigation for MySpace, Inc., including
5 responses to certain subpoenas.
6

7 2. Except where specifically stated otherwise, I have personal
8 knowledge of the facts set forth below. I submit this Declaration in support of
9 Non-Party MySpace, Inc.'s ("My Space's") Contentions in the Joint Stipulation
10 Opposing Enforcement of the Subpoena served on it by Defendants Lime Group et
11 al. ("Defendants").
12

13 3. I first became aware that Defendants sought discovery from
14 MySpace on or around September 23, 2010, when Defendants' 462 page subpoena
15 was sent to me. That subpoena (the "Subpoena"), attached to the Declaration of
16 Dan Kozusko as Exhibit 1, purported to call for extremely broad production of
17 documents, plus a personal appearance of a witness, on less than ten days' notice.
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19 4. On October 1, 2010, I sent a letter to Defendants' counsel,
20 noting the impropriety of their subpoena in terms of its breadth and scope, and
21 stating objections. Those objections are included as Exhibit 2 to the Kozusko
22 Declaration. MySpace advised in that letter that "many of the documents sought
23 by your subpoena are equally within the possession, custody, and control of one of
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1 the parties to the lawsuit” and that if Defendants proceeded to attempt to enforce
2 their subpoena, MySpace would seek recovery of its costs and attorneys’ fees.

3 5. Although I cannot recall the precise date, sometime after I
4 served the objections, I spoke with Mary Eaton, counsel for Defendants. I advised
5 Ms. Eaton that MySpace could not be treated as a “back door” to discovery that
6 could equally be obtained by party discovery, and that we viewed their subpoena
7 as unreasonably broad. I advised her that if there were reasonably specific and
8 non-duplicative documents they were seeking from MySpace, we would be willing
9 to discuss production.
10
11

12 6. I did not hear further from Defendants until October 17, when I
13 received an e-mail from Dan Kozusko. A copy of that e-mail is attached as Exhibit
14 4 to the Kozusko declaration, Mr. Kozusko and I spoke on October 22, 2010.
15 During that conversation, I requested that he summarize the documents that
16 Defendants sought from MySpace so that I could determine whether they sought
17 anything discoverable and non-cumulative. Mr. Kozusko’s e-mail outlining those
18 categories is included as Exhibit 6 to the Kozusko Declaration. Mr. Kozusko did
19 not include any reference to documents mentioning “Lime Wire” – i.e., documents
20 that would be responsive to Document Request 6. In that conversation, I asked Mr.
21 Kozusko to explain the relevance of MySpace producing documents that were
22 equally obtainable from their adversary in the litigation. I do not recall whether he
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1 had any response to my question regarding relevance, but he asserted that nothing
2 precluded Defendants from seeking duplicative discovery from MySpace.

3 7. On November 2, 2010, I responded to Mr. Kosuzko's e-mail,
4 having learned that Plaintiffs had produced certain categories of documents
5 requested by Defendants from MySpace and were contesting the discoverability of
6 others. That e-mail is attached to the Kozusko Declaration as Exhibit 8. I advised
7 Mr. Kozusko that I saw no need to re-produce identical copies of the documents
8 they had already received, and if the Court ruled other categories non-discoverable,
9 such documents would be equally non-discoverable from third parties. I suggested
10 that our conversations might be more productive after the Southern District offered
11 more guidance but offered to speak with Mr. Kozusko immediately if he preferred
12 not to wait.

13 8. I did not hear further from Mr. Kozusko until more than a
14 month later, on the afternoon of Friday, December 10, when he forwarded me an
15 order that Magistrate Judge Freeman entered almost two weeks earlier. In that
16 same e-mail, Mr. Kosuzko for the first time proposed a slight narrowing of the
17 production of documents demanded under the Subpoena. With regard to
18 "communications," Mr. Kosuzko proposed "running search terms on the relevant
19 custodians to find potentially responsive documents," although he still did not offer
20 any theory of what documents would be relevant and did not propose any search
21 terms. Mr. Kosuzko's e-mail is attached to his declaration as Exhibit 12.

1 9. Less than two business days later, on Tuesday December 14, I
2 received an out-of-the-blue e-mail from Ian Christy, who is apparently a colleague
3 of Mr. Kozusko's at Willkie Farr in New York. Mr. Christy's e-mail attached
4 Defendants' portion of a Joint Stipulation and purported to trigger the process to
5 file a motion to compel under Local Rule 37-2. I responded later that evening,
6 advising Mr. Kosuzko and his colleague that they had not complied with the
7 prerequisites to forwarding a Joint Stipulation. Although Mr. Kozusko purported
8 to disagree, he asserted that "Defendants [would] deem, the Joint Stipulation [sent
9 on December 14] to be the letter required by Local Rule 37[-]1." I did not agree
10 with this proposal and reserved all objections, but arranged to speak with Mr.
11 Kozusko on December 17. The complete e-mail thread of this correspondence
12 leading up to our December 17 conference is attached to the Kozusko declaration
13 as Exhibit 20.

14 10. In that telephone conference on December 17, 2010, Mr.
15 Kozusko and I, along with a colleague of mine from MySpace, were able to reach
16 agreement with regard to the first and third categories set out in Mr. Kozusko's
17 October 22, 2010 e-mail. Even though the documents requested were duplicative,
18 because we could assemble them with only hours (as opposed to hundreds of
19 hours) of effort, we agreed to provide an index of contracts with Plaintiffs and
20 certain financials that we understood Plaintiffs had already been ordered to
21 produce. With regard to "communications," however, Mr. Kozusko was in my
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1 view unable to articulate a theory of relevance that would justify MySpace
2 undertaking any burden, much less the substantial burden required to image,
3 search, and review the documents of potentially dozens of custodians. It became
4 clear to me during that conversation that Defendants were hoping to find a
5 document somehow helpful to their defense, as opposed to having a specific idea
6 of the content of documents that existed (which might make search terms useful to
7 finding such a document). I explained the process of searching electronic
8 document to Mr. Kozusko and advised him that we believed the discovery sought
9 was not relevant and was cumulative and unduly burdensome. In that
10 conversation, I also advised him that I found it to be misleading that he continued
11 to cite to Magistrate Judge Freeman's order for the proposition that
12 communications were "relevant," without citing to Judge Wood's order on appeal,
13 in which she found the relevance "potentially tenuous." Mr. Kozusko stated he
14 was aware of Judge Wood's order and said, in effect, "it is what it is." I also
15 advised him that his treatment of Magistrate Judge Freeman's order regarding
16 Vevo was misleading insofar as it failed to acknowledge that the Order merely
17 ratified a compromise proposed by Vevo over his client's objection. I cautioned
18 him not to proceed with a Joint Stipulation on these grounds and with those
19 misrepresentations, but he reserved the right to do so.

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26 11. On December 20, 2010, MySpace produced the index it agreed
27 to produce to satisfy Plaintiff's requests under the first category of documents
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1 specified in Mr. Kozusko's October 22, 2010 e-mail. A true and correct cover
2 letter to that production, without its enclosures, is attached as Exhibit 23.

3 12. On December 23, 2010, MySpace produced a DVD containing
4 the financial documents it agreed to produce, satisfying Plaintiff's requests under
5 the third category of documents specified in Mr. Kozusko's October 22, 2010 e-
6 mail. A true and correct cover letter to that production, without its enclosures, is
7 attached as Exhibit 24.
8

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10 13. I was not aware that Defendants sought to serve me with their
11 portions of a Joint Stipulation until December 28, 2010. Defendants apparently
12 sent a revised joint stipulation by e-mail on December 20, but it was not received
13 because of the large size of the e-mail's attachments. I did not receive all portions
14 of Defendants' portion of the current Joint Stipulation until December 29, 2010.
15 Mr. Kozusko and I were able to negotiate a mutually acceptable schedule.
16

17
18 14. In the course of preparing my opposition to this Joint
19 Stipulation, I learned that Defendants have filed Motions to Compel against
20 various third-party recipients in multiple jurisdictions around the country. I have
21 spoken with counsel for Amazon, Yahoo!, Google, and MediaDefender, all of
22 whom are currently litigating or who have litigated the same issues against
23 Defendants. None of these third-party companies voluntarily agreed to undertake
24 the burden to search for "communications" in response to Defendants' subpoenas.
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1 15. My research also revealed an order entered by this Court on
2 December 22, 2010, denying Defendants' motion to compel against
3 MediaDefender. A true and correct copy of that order is attached as Exhibit 24.
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5 16. As part of my defense of MySpace in litigation, I am generally
6 familiar with its business and business practices. MySpace Music, which was
7 formed as a separate division in early 2008, currently has about 70 full-time
8 employees. The best estimate provided is that 22-30 of those employees
9 communicated with representatives of the major labels – i.e., a representative of
10 one of the 13 Plaintiffs – on a weekly or more frequent basis, often several times a
11 day. In addition, I am aware that many other employees and agents of MySpace,
12 including those not technically within MySpace Music, from time-to-time assist on
13 projects involving one or more of the major record companies.
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16 17. As a litigator at Fox Group Legal, I am required to be familiar
17 with the process for collection, processing, and review of electronic documents.
18 That process requires, first, imaging and upload of the custodian's repositories of
19 electronically stored information. Depending on the nature of those repositories
20 and their size, capture may take anywhere from one to five hours per custodian of
21 specialized personnel's time. Once the data are captured, they are typically
22 uploaded and processed into searchable format. This process, again depending on
23 size of the data, may take another one to two hours of specialized personnel's time,
24 plus additional hours of computer processing time, during which the computers are
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1 unavailable to perform other tasks. Once the data are loaded, it is possible to run
2 search terms to cull down the data to documents that contain a term or terms. After
3 search terms are run, manual review by an attorney or paralegal is necessary to
4 determine whether the search terms “hit” responsive documents or whether they
5 obtained false positives, as is common with general search terms. Manual review
6 is also necessary to determine whether a document is protected by attorney-client
7 privilege or other protections. Depending on the size of the data set, manual
8 review of documents can take hundreds or thousands of work-hours.

11 18. In the course of my duties, I have frequently reviewed
12 electronically captured documents, and I am familiar with the use of search terms
13 and manual review resulting therefrom. Defendants’ request for
14 “communications” would have necessitated capture and review of dozens of
15 custodians’ electronically stored information. The capture, by itself, would have
16 taken hundreds of hours and prevented the specialized technical personnel from
17 performing their other essential duties, which includes assisting in the defense of
18 cases brought against MySpace as a party. Even after uploading these data and
19 running search terms, I or a paralegal would have to find time to manually review
20 the search results, which could run into the hundreds of hours. The generic search
21 terms that Plaintiffs propose – including words like “license,” “contract,” and
22 “agreement,” based on my experience, are likely to generate thousands, if not tens
23 or hundreds of thousands, of “hits.”
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1 19. From the date that Defendants forwarded their Joint Stipulation,
2 I began keeping contemporaneous records of my time, intending to seek to collect
3 compensation in the event that Defendants proceeded with their Motion. I have
4 spent well in excess of 25 hours corresponding with Defendants, speaking with
5 their counsel on the phone, and researching and preparing this Opposition to the
6 Joint Stipulation. This estimate does not include the time of any other individuals
7 who assisted me in, for example, preparing production of documents that we
8 produced to Defendants.
9

10
11 20. Prior to joining Fox Group Legal, I was an associate and
12 Counsel at Akin Gump Strauss Hauer & Feld in Los Angeles in the litigation and
13 law & strategy groups. I joined Akin Gump in Los Angeles following a clerkship
14 for the Honorable Roger J. Miner of the United States Court of Appeals for the
15 Second Circuit. I obtained my J.D. in 1997 from The George Washington
16 University Law School with highest honors, where I served as Editor-in-Chief of
17 the Law Review and as a member of the Moot Court Board. At the time I left Akin
18 Gump in 2004, my standard billing rate was well in excess of \$350 per hour.
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21 21. As part of my job at Fox Group Legal, I hire outside counsel
22 and review their bills. As a result, I am very familiar with the rate structure for law
23 firms of all sizes in Los Angeles. At a major international law firm, the billing
24 rates for attorneys with backgrounds, seniority, and skills similar to mine typically
25 exceed \$500 per hour. Based on my knowledge of the Los Angeles legal market, I
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1 am confident that I could command at least \$500 an hour for work on cases similar
2 to the *Arista Records* matter. It is extremely likely that the rates for attorneys of
3 comparable seniority at Willkie Farr, Defendants' law firm, are considerably
4 higher than \$500 an hour.
5

6 22. Using \$500 an hour as an applicable rate, and estimating
7 conservatively that I spent 25 total hours addressing Defendants' Joint Stipulation,
8 MySpace requests recovery of no less than \$12,500 as compensation and as a
9 sanction for Defendants' misconduct.
10

11 I declare under penalty of perjury that the foregoing statements are true and
12 correct to the best of my knowledge and belief.
13

14 January 6, 2011, in Los Angeles, California.
15

16 /s/ Jonathan Gottlieb

17 Jonathan Gottlieb
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EXHIBIT 23



FOX GROUP
A UNIT OF NEWS CORPORATION

P.O. Box 900
Beverly Hills, California 90213-0900
Phone 310 369 3271 • Fax 310 969 0144
e-mail: jonathan.gottlieb@fox.com

Jonathan Gottlieb
Senior Vice President, Litigation
Fox Group Legal

VIA REGULAR MAIL

December 20, 2010

Dan Kozusko, Esq.
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019

RE: Subpoena propounded on MySpace, Inc. in *Arista Records LLC et al. v. Lime Group, LLC*, No 06 CV 5936 (KMW) (SDNY)

Dear Mr. Kozusko:

Pursuant to the agreement we reached on Friday, December 17 with regard to the above-mentioned subpoena, please find enclosed an index of agreements between MySpace, on the one hand, and any Plaintiff, on the other. MySpace created this index based on a reasonably diligent search of agreements in its possession, custody or control. We understand that, by production of this Index, MySpace satisfies its responsibilities under the subpoena with regard to document requests calling for production of agreements (*i.e.* category #1 listed in your October 22, 2010 e-mail).

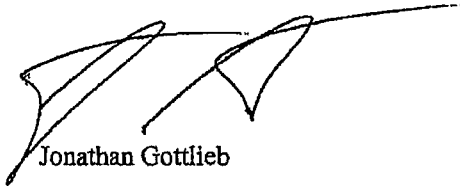
Also pursuant to our oral agreement on Friday, MySpace gave notice to the labels today that it intended to produce summaries showing total payments under agreements between MySpace Music and the Plaintiffs. MySpace requested that any Plaintiff who objected to this production notify me on or before 5:00 p.m. Pacific Time on Thursday, December 23. In the absence of an objection from one of the Plaintiffs, we intend to produce these documents to you on Friday, December 24. We understand that, by production of those summaries, MySpace satisfies its responsibilities under the subpoena with regard to document requests calling for financial information (*i.e.* category #3 listed in your October 22, 2010 e-mail).

MySpace produces all documents in this matter "Restricted Confidential--Outside Attorneys' Eyes Only."

We also discussed your request for communications between MySpace and any Plaintiff (*i.e.*, category #2 listed in your October 22, 2010 e-mail). We explained the burden associated with collecting, searching, and producing this material, which potentially involves "scores" of custodians over multiple years and is not amenable to reasonably narrowed search terms. We further discussed our view that forcing a third party to undertake this burden in light of the "tangential relevance" associated with these documents is not consistent with Rule 45. While we

were unable to reach agreement with regard to category #2 "communications" documents, we expect that the compromises we were able to reach are sufficient to avoid court intervention on this matter.

Very truly yours,



Jonathan Gottlieb

cc: Daniel Cooper

Enclosures: MySpace 1-5

EXHIBIT 24



FOX GROUP
A UNIT OF NEWS CORPORATION

P.O. Box 900
Beverly Hills, California 90213-0900
Phone 310 369 3271 • Fax 310 369 0144
e-mail: jonathan.gottlieb@fox.com

Jonathan Gottlieb
Senior Vice President, Litigation
Fox Group Legal

VIA REGULAR MAIL

December 23, 2010

Dan Kozusko, Esq.
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019

RE: Subpoena propounded on MySpace, Inc. in *Arista Records LLC et al. v. Lime
Group, LLC*, No 06 CV 5936 (KMW) (SDNY)

Dear Mr. Kozusko:

Pursuant to the oral agreement we reached on Friday, December 17, and further to my letter of December 20, please find enclosed a DVD including .tiff images of documents numbered MySpace 0006-0399. Those documents are summaries showing total payments under agreements between MySpace Music and the Plaintiffs. By production of these documents, MySpace has satisfied the obligations to which it agreed under the subpoena.

MySpace produces all documents in this matter "Restricted Confidential--Outside Attorneys' Eyes Only."

Very truly yours,

A handwritten signature in black ink, appearing to read "Jonathan Gottlieb".

Jonathan Gottlieb

cc: Daniel Cooper (w/o enclosures)

Enclosures: DVD with MySpace 0006-0399

EXHIBIT 25

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date December 22, 2010
Title Arista Records LLC, et al., v. Lime Wire LLC, et al.

Present: The Honorable PATRICK J. WALSH, UNITED STATES MAGISTRATE JUDGE

Rose Petrossians

CS 12/22/10

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Non-Party:

Attorneys Present for Defendants:

Linda M. Burrow

Michael S. Blanton
Dan Kozusko

Proceedings: Defendants' Petition to Enforce Subpoena to MediaDefender

After a hearing on Defendants' Petition to enforce a subpoena against non-party MediaDefender, the Court denied the Petition for the reasons set forth below.

Plaintiffs, record companies, sued Defendants, a peer-to-peer file sharing service, in the district court in New York, alleging that Defendants were responsible for infringing on their copyrights and inducing others to do the same. The district court agreed and issued a permanent injunction against Defendants. The only issue remaining for trial is the issue of damages.

Defendants have served a number of subpoenas on various non-parties, ostensibly seeking discovery of information relating to the issue of damages. These subpoenas are directed, almost exclusively, to non-party licensees and seek information about Plaintiffs' licensing of their copyrighted works. (See Exh. 10 to Kozusko Dec., Judge Wood's Nov. 19, 2010 Order at pp. 2, 7.) One of the non-parties Defendants subpoenaed was MediaDefender, Inc. MediaDefender provides anti-piracy software to Plaintiffs and others that is designed to prevent, or at least minimize, the infringement of copyrighted works. It does not license works. MediaDefender has resisted the subpoena on the grounds that the documents Defendants seek do not fall within the subpoena's request and, even if they did, they are not relevant to the damages issues. MediaDefender argues further that any documents that might be relevant are confidential and entitled to protection, which cannot be insured under the current protective order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date December 22, 2010

Title Arista Records LLC, et al., v. Lime Wire LLC, et al.

Defendants disagree. They contend that the documents they seek from MediaDefender fall within the subpoena requests and that MediaDefender's argument to the contrary has been waived since it did not raise the issue earlier. Defendants also argue that the documents they seek are relevant to show the conduct and attitude of Plaintiffs and the extent of the infringement, which are relevant in determining damages. Defendants argue further that these documents will show when Plaintiffs' works were first infringed, another important issue in the damages calculation. Defendants contend that the protective order now in place is sufficient to protect MediaDefender's proprietary information.

The Court sides with MediaDefender. It seems obvious to the Court that Defendants served the wrong non-party, or, at least, served the wrong subpoena on it. The subpoena is clearly directed at a licensee of Plaintiffs' music. MediaDefender does not license music. Thus, MediaDefender's argument that the documents they possess do not fall within the subpoena is persuasive. The fact that MediaDefender did not raise the issue earlier, when it was proceeding without counsel in negotiations with Defendants, is not controlling. Defendants, too, have failed to follow the letter of the law in connection with this subpoena. Among other things, they waited from November 4, 2010 to December 3, 2010 to respond to MediaDefender's challenges to the subpoena, creating an emergency which required the Court and MediaDefender to drop what they were doing to address this motion.

Further, even if the documents were responsive to the subpoena, the Court would still deny Defendants' motion to compel production because they are not the least bit relevant to the issue of damages. Plaintiffs' interaction with MediaDefender will not establish what Plaintiffs' attitudes were during the relevant period. Plaintiffs consist of a number of record companies who, presumably, work independently of each other through various employees at these companies. There is nothing in this record to suggest that these numerous companies and their numerous employees have an attitude that can be gleaned by reading their contracts with MediaDefender or deposing an employee of MediaDefender. Though the documents and deposition may provide insight into MediaDefender's attitude, MediaDefender is not a party to this action and its attitude is irrelevant.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date December 22, 2010

Title *Arista Records LLC, et al., v. Lime Wire LLC, et al.*

Nor have Defendants convinced the Court that obtaining documents from MediaDefender will allow Defendants to establish the extent of the infringement or when the infringement began. As MediaDefender points out, the district court has already determined that 98.8% of the downloads by LimeWire users were for unauthorized files. And LimeWire knows when it started operating the software and, apparently, how many downloads took place, i.e., more than 3 billion each month as of 2005. (See Opp. at 3.) Thus, Defendants do not have to go far to understand the extent of the damages suffered by Plaintiffs. Obtaining documents from MediaDefender will not advance that process measurably and, as a non-party to this action, the Court is not inclined to require it to produce anything in these circumstances. For this reason, Defendants' Petition to compel production from MediaDefender and require an employee from MediaDefender to attend a deposition is denied.

_____ : 30
Initials of Preparer rp

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No: CV 10-9438-GW (PJWx) Date: December 22, 2010
Title: *Arista Records LLC, et al., v. Lime Wire LLC, et al.*

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STATE OF CALIFORNIA)
) ss:
CITY AND COUNTY OF LOS ANGELES)

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Roberts, Raspe & Blanton LLP, Union Bank Plaza, 445 South Figueroa Street, Suite 3200, Los Angeles, California 90071.

On January 7, 2011, I caused the foregoing document(s) to be served:

DECLARATION OF JONATHAN GOTTLIEB IN SUPPORT OF NON-PARTY MYSPACE, INC.'S CONTENTIONS IN JOINT STIPULATION OPPOSING ENFORCEMENT OF SUBPOENA

on the interested parties, by placing a true and correct copy thereof in a sealed envelope(s) addressed as follows:

Jonathan Gottlieb, Esq.
Fox Group Legal
2121 Avenue of the Starts, Suite 700
Los Angeles, California 90067

Attorneys for Non-Party Respondent
MySpace, Inc.

VIA PERSONAL DELIVERY:
At the address listed above.

Glenn D. Pomerantz
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Attorneys for Plaintiffs Arista Records LLC; Atlantic Recording Corp.; BMG Music; Capitol Records, Inc.; Elektra Entertainment Group Inc.; Interscope Records; Laface Records LLC; Motown record Company, L.P.; Priority Records LLC; Sony BMG Music Entertainment; UMG Recordings, Inc.; Virgin records America, Inc.; and Warner Bros. Records Inc.

VIA OVERNIGHT MAIL:
VIA Federal Express: By delivering such documents to an overnight mail service or an authorized courier in an envelope or package designated by the express service courier addressed to the person(s) on whom it is to be served.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on January 7, 2011, at Los Angeles, California.

/s/ Melissa L. Gonzalez

EXHIBIT H

"Steal It" and Other Internal YouTube Emails from Viacom's Copyright Suit

By [Kit Eaton](#)



The U.S. District Court has just made public the documentation in the controversial Viacom vs. YouTube case. It's a goldmine of data, most of which is really dirty mud-slinging by Viacom, based on internal emails from YouTube's past.

Google's [1] been quick off the mark to react to the unsealing of the court documents, and has a [blog post](#) [2] defending its position and decrying Viacom's tactics already. Viacom's argument, it says, is based on misconstruing "isolated lines from a handful of emails" from way back in YouTube's history, and spinning this information into the suggestion that YouTube was "founded with bad intentions." The post also alleges that Viacom "secretly uploaded its content to YouTube," and then roughed up the footage to make it appear to have been leaked.

Viacom is trying to portray that YouTube was built on the principles of making money from out-and-out piracy, and that Google was complicit in this when it bought the site. It's even suggesting Google engaged in "high-tech extortion" by refusing to take down copyright-violating clips unless the content owners licensed the content back to Google.

The most damning of all this, though are the internal e-mails, mostly sent back and forth between YouTube's founders [Chad Hurley and Steve Chen](#) [3]. Here are the best, in their unedited glory:

- In a **February 11, 2005** email to YouTube cofounders Chad Hurley and Steve Chen, with the subject

"aiming high," YouTube cofounder Jawed Karim wrote that, in terms of "the number of users and popularity," he wanted to "finnly place [YouTube] among" "napster," "kazaa," and "bittorrent."

- In an **April 23, 2005** email to YouTube cofounders Steve Chen and Chad Hurley, YouTube co-founder Jawed Karim wrote: "It's all 'bout da videos, yo. We'll be an excellent acquisition target once we're huge."
- In an **April 25, 2005** email to YouTube cofounders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley noted the presence of a "South Park" clip on YouTube and questioned whether it should be left on the site because "its [sic] copyrighted material."
- In a **June 15, 2005** email to YouTube cofounders Chad Hurley and YouTube cofounder Jawed Karim, YouTube co-founder Steve Chen stated "we got a complaint from someone that we were violating their user agreement. i *think* it may be because we're hosting copyrighted content. instead of taking it down - i'm not about to take down content because our ISP is giving us shit - we should just investigate moving www.youtube.com [4]..."
- In a **June 15, 2005** email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founders Chad Hurley stated: "So, a way to avoid the copyright bastards might be to remove the 'No copyrighted or obscene material' line and let the users moderate the videos themselves. legally, this wi1 probably be better for us, as we'll make the case we can review all videos and tell them if they're concerned they have the tools to do it themselves."
- In a **June 20, 2005** email to YouTube co-founders Chad Hurley and Steve Chen, YouTube co-founder Jawed Karim wrote: "If we want to sign up lots of users who keep coming back, we have to target the people who will never upload a video in their life. And those are really valuable because they spend time watching. And if they watch, then it's just like TV, which means lots of value."
- On **June 21, 2005**, YouTube co-founder Jawed Hohengarten, Karim stated in an email to YouTube cofounders Chad Hurley and Steve Chen that "Where our value comes in is USERS.... [O]ur buy-out value is positively affected by ... more Youtube users.... The only thing we have control over is users. We must build features that sign up tons of users, and keep them coming back."
- On **July 4, 2005**, YouTube co-founder Chad Hohengarten Hurley sent an email to YouTube cofounders Steve Chen and Jawed Karim titled "budlight commercials," stating "we need to reject these Hohengarten too" Steve Chen responded by asking to "leave these in a bit longer? another week or two can't hurt;" Jawed Karim subsequently stated that he "added back all 28 bud videos. stupid...," and Steve Chen replied: "okay first, regardless of the video they upload, people are going to be telling people about the site, therefore making it viral. they're going to drive traffic. second, it adds more content to the site. third, we're going to be adding advertisements in the future so this gets them used to it. I'm asking for a couple more weeks."
- In a **July 10, 2005** email to YouTube cofounders Chad Hurley and Steve Chen, YouTube cofounder Jawed Karim reported that he had found a "copyright video" and stated: "Ordinarily I'd say reject it, but I agree with Steve, let's ease up on our strict policies for now. So let's just leave copyrighted stuff there if it' s news clips. I still think we should reject some other things tho. . ."; Chad Hurley replied, "ok man, save your meal money for some lawsuits! ;) no really, I guess we'll just see what happens."
- In a **July 10, 2005** email to YouTube founders Jawed Karim and Steve Chen, YouTube cofounder Chad Hurley wrote: "yup, we need views. I'm a little concerned with the recent supreme court ruling on copyrighted material though."
- In a **July 19, 2005** email to YouTube cofounders Chad Hurley and Jawed Karim, YouTube cofounder Steve Chen wrote: "jawed, please stop putting stolen videos on the site. We're going to have a tough time defending the fact that we're not liable for the copyrighted material on the site because we didn't put it up when one of the cofounders is blatantly stealing content from other sites and trying to get everyone to see it."

- On **July 19, 2005**, YouTube co-founder Steve Chen sent an email to YouTube co-founder Jawed Karim, copying YouTube co-founder Chad Hurley, stating "why don't i just put up 20 videos of pornography and obviously copyrighted materials and then link them from the front page. what were you thinking."

- On **July 22, 2005**, YouTube co-founder Steve Chen forwarded to all YouTube employees "YouTube Marketing Analysis" stating that "users not only upload their own work, but can potentially upload publicly available content for viewing. Risk area here is copyright as many videos which are uploaded are not the property of the uploader.... Although the policy when uploading states that the video must be legit, YouTube may be liable for any damages which copyright holders may press."

- In a **July 23, 2005** email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley responded to a YouTube link sent by Jawed Karim by saying: "if we reject this, we need to reject all the other copyrighted ones.... should we just develop a flagging system for a future push?"; Karim responded: "I say we reject this one, but not the other ones. This one is totally blatant."

- In a **July 29, 2005** email about competing video websites, YouTube co-founder Steve Chen wrote to YouTube co-founders Chad Hurley and Jawed Karim, "steal it!", and Chad Hurley responded: "hmm, steal the movies?" Steve Chen replied: "we have to keep in mind that we need to attract traffic. how much traffic will we get from personal videos? remember, the only reason why our traffic surged was due to a video of this type.... viral videos will tend to be THOSE type of videos."

- In an **August 9, 2005** email to YouTube co-founders Steve Chen and Jawed Karim, YouTube co-founder Chad Hurley stated: "we need to start being diligent about rejecting copyrighted/inappropriate content. we are getting serious traffic and attention now, I don't want this to be killed by a potentially bad experience of a network exec or someone visiting us. like there is a cnn clip of the shuttle clip on the site today, if the boys from Turner would come to the site, they might be pissed? these guys are the ones that will buy us for big money, so lets make them happy. we can then roll a lot of this work into a flagging system soon."

- In response to YouTube co-founder Chad Hurley's **August 9, 2005** email, YouTube co-founder Steve Chen stated: "but we should just keep that stuff on the site. I really don't see what will happen. what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away. he get in touch with cnn legal. 2 weeks later, we get a cease & desist letter. we take the video down"; Chad Hurley replied: "I just don't want to create a bad vibe... and perhaps give the users or the press something bad to write about."

- On **August 10, 2005**, YouTube co-founder Jawed Karim responded to YouTube cofounder Chad Hurley: "lets remove stufflike movies/tv shows. lets keep short news clips for now. we can become stricter over time, just not overnight. like the CNN space shuttle clip, I like. we can remove it once we're bigger and better known, but for now that clip is fine." Steve Chen replied, "sounds good."

- On **September 3, 2005**, YouTube co-founder Steve Chen stated in response to YouTube co-founder Jawed Karim's "really lax" policy: "yes, then i agree with you. take down whole movies, take down entire TV shows, take down XXX stuff. everything else. keep including sports, commercials, news, etc. keeping it, we improve video uploads, videos viewed, and user registrations"; Chad Hurley replied: "lets just work in that flagging feature soon. . . then we won't be liable."

- On **September 12, 2005**, the "Official YouTube Blog" stated: "We are ecstatic to announce the changes we made to the site First up, video flagging. At the bottom of the video watch page, you will notice a new section for flagging a video. Ifyou encounter a video that's inappropriate or copyrighted, please use this feature to notify us. We will aggressively monitor these submissions and respond as quickly as we can."

Make of all that what you will (Viacom's made a legal case out of it) but Google's also slinging some mud of its own in return. In closing its blog post, it notes that Viacom's pressing for regulation that would "require YouTube--and every Web platform--to investigate and police all content users upload." Always

nice to end with a threat that the other party's legal ambitions may bring an end to the Net as we know it.

Related: The Brief But Impactful History of YouTube [5]



To follow this story as it progresses, and quite possibly gets yet more vicious, follow me, Kit Eaton [6] on Twitter.

Links:

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- [2] <http://youtube-global.blogspot.com/2010/03/broadcast-yourself.html>
- [3] <http://www.fastcompany.com/magazine/142/it-had-to-be-you.html>
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